Issue: Qualification/counseling memorandum; retaliation/grievance activity participation; misapplication of policy/claims of workplace violence; Ruling Date: February 18, 2005; Ruling #2004-919, 2004-921; Agency: Department of Corrections; Outcome: issue of workplace violence qualified for hearing, issue of counseling memorandum not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections/ No. 2004-919 & 921
February 18, 2005

The grievant has requested qualification of his May 27, 2004 and July 16, 2004 grievances. For the reasons set forth below, the July 16th grievance is qualified for hearing but the May 27th grievance is not.

FACTS

The grievant is employed with the Department of Corrections (DOC) as a Corrections Officer. He asserts that a significant number of valid inmate disciplinary charges issued by corrections officers have been improperly dismissed by the agency.

In September of 2002, another corrections officer at the facility where the grievant worked filed a grievance alleging that the agency had misapplied policy and retaliated against him. He too had claimed that a significant number of valid inmate disciplinary charges issued by corrections officers had been improperly dismissed by the agency. On October 6, 2003, a hearing was held at the agency's regional office, and in an October 20, 2003 hearing decision, the hearing officer ruled that the agency had in fact misapplied policy. The corrections officer had claimed that the agency's preferential treatment of a particular inmate (Inmate E) had undermined his authority with inmates and created a hazardous work environment. The hearing officer found "that because Inmate E was given special consideration when facing disciplinary action, the agency emboldened Inmate E and made him feel protected when making direct or indirect threats against [the corrections officer]."[1] He further found that the "[corrections officer] was placed in reasonable fear of injury by Inmate E."[2] The hearing officer concluded that by

[1] In particular, the hearing officer determined that the Inmate Hearing Officer (IHO) had violated policy because he "(1) dissuaded [the corrections officer] from filing charges against Inmate E, (2) arbitrarily dismissed charges against Inmate E while Inmate E "was working for" the IHO, and (3) shredded a stack of charges pending against Facility inmates." October 20, 2003, Hearing Decision, page 6. The hearing officer held that the "IHO's actions made Inmate E believe he could abuse his relationship with [the corrections officer] and made [the corrections officer] unnecessarily fear injury by Inmate E and by inmates within Inmate E's immediate circle of friends." October 20, 2003, Hearing Decision, Case No. 5813, pages 6-7.

[2] October 20, 2003, Hearing Decision, Case No. 5813, page 7.

"failing to apply IOP [internal operating procedure] 861 the agency failed to properly protect [the corrections officer] from workplace violence" and that the "agency's actions were contrary to the DHRM Policy 1.80, *Workplace Violence*."[3] The hearing officer ordered the agency to "comply with IOP 861 and thereby protect [the corrections officer] from workplace violence."[4]

Returning to this case, the grievant alleges that on February 16, 2004, a co-worker told him of a rumor that the grievant had cancer. At the time, the grievant dismissed the rumor as a "distasteful joke." The grievant began to regard the rumor more seriously, however, when a few days later, another co-worker reported that she had been told by a captain that the grievant was "eaten up with cancer and [didn't] have long to live." Although, in both instances, the grievant apparently denied that he was ill, approximately two-and-a-half weeks later, on March 9, 2004, a different co-worker reported to the grievant that another officer had expressed her sympathy for the grievant, whom she had heard was dying of cancer.

The grievant alleges that while the rumors regarding his health are false, they nevertheless have resulted in his being "very disgusted and disgruntled, feeling anguish and stress." Although the grievant heard the rumors from several co-workers, he asserts that the rumors were initiated by the same captain who had told one co-worker that he was "eaten up" with cancer. The grievant claims that the captain's discussion of his purported health status violated his "rights of confidentiality."

On March 15, 2004, the grievant initiated a grievance regarding the cancer rumors. The DOC agency head denied the grievant's request for qualification on the basis that there was insufficient evidence to support the grievant's allegations against the captain. This Department was then asked to qualify the March 15th grievance for hearing. This Department also denied qualification on the basis that the dissemination of the rumors did not constitute an adverse employment action.[5]

On or about May 5, 2004, the grievant asserts that he was improperly counseled by a Major at a meeting in the presence of others for the alleged use of obscene language. On May 27, 2004, the grievant challenged the Major's actions by initiating a grievance, one of the two grievances that the grievant now asks this Department to qualify. The grievance claimed that "the reprimand took place . . . for no reason other than a retaliatory measure for using the grievance procedure and his [the Major's] own personal; satisfaction to belittle [and] harass."

Also, sometime around May of 2004, the grievant and several other corrections officers, including the one who successfully brought the above discussed 2002 grievance regarding the negation of inmate charges, were told to "clean up" the 1A building that housed inmates who had been removed from the Therapeutic Community (TC) program.

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[3] *Id.*
[4] *Id.*, page 8.
[5] *See* EDR Ruling No. 2004-827.

As a result of the "clean up"' directive, the corrections officers issued a number of disciplinary actions to inmates for various infractions. According to the grievant and one of the other officers, however, the majority of these charges were improperly dismissed.

On June 21, the grievant was transferred to another facility, as was the employee who prevailed in the 2002 grievance challenging the agency's disposition of inmate charges.[6] On July 16, 2004, the grievant initiated a grievance asserting that the agency's practice of dismissing valid disciplinary actions continues and that those who object to the practice are subjected to retaliation. (The July 16th grievance is the second of the grievances that the grievant now asks this Department to qualify.)

DISCUSSION

The July 16th Grievance

A. Misapplication of Policy:

The July 16th grievance claims that management "endangers enforcement officers by its policy of negating a significant number of charges (citations) written by enforcement officers against inmates, thereby diminishing both (1) the officers' authority and (2) control of the inmates." Thus, while the grievant does not expressly cite to the state's workplace violence policy,[7] a fair reading of the grievance makes out a claim that the agency's actions (or inactions) caused the grievant to be subject to threatening behavior and a heightened risk of physical violence.

The General Assembly has limited issues that may qualify for a hearing to those that involve "adverse employment actions."[8] The threshold question then becomes whether or not the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment act constituting a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[9] A misapplication of policy may constitute an adverse employment action if, but only if, the misapplication results in an adverse effect *on the terms, conditions, or benefits* of one's employment.[10]

State policy requires agencies to take steps to assure that workplaces are free of violence. Workplace violence includes "any physical assault, *threatening behavior* or

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[6] A captain who had spoken on behalf of the employee who prevailed with the 2002 grievance was also transferred at approximately the same time.
[7] Department of Human Resource Management (DHRM) Policy 1.80, "Workplace Violence."
[8] Va. Code § 2.2-3004(A).
[9] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[10] Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

verbal abuse occurring in the workplace by employees *or third parties*."[11] DHRM Policy 1.80 expressly requires that agencies must protect victims of workplace violence and those who report acts of violence.[12] Federal and state laws also require employers to provide safe workplaces.[13] Thus, an act or omission by an employer resulting in actual or threatened workplace violence against an employee, or an unreasonably unsafe work environment for that employee, can reasonably be viewed as having an adverse effect on the terms, conditions, or benefits of his employment.[14]

In this case, the grievant has presented evidence raising a sufficient question as to whether the agency's actions failed to protect him against the threat of workplace violence and/or were otherwise contrary to the state's workplace violence policy. As discussed above, in the 2002 grievance brought by another corrections officer regarding the negation of charges, a hearing officer found that by "failing to apply IOP [internal operating procedure] 861 the agency failed to properly protect [the corrections officer] from workplace violence" and that the "agency's actions were contrary to the DHRM Policy 1.80, *Workplace Violence*."[15] Although the hearing officer ordered the agency to enforce IOP 861, the grievant asserts that it has not done so. At least one other corrections officer has asserted that the agency continues to negate valid charges. Accordingly, there remains a question of fact as to whether the agency's action (or inaction) is contrary to DHRM Policy 1.80, which is best answered by a hearing officer through the grievance hearing process.

B. Retaliation:

The grievant claims that officers, himself included, who have voiced concerns about the agency's policy regarding the negation of inmate charges are subjected to retaliation. Because the issue of alleged misapplication of IOP 861 has been qualified for hearing, it is reasonable to send to hearing as well the directly related issue of purported

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[11] DHRM Policy 1.80, "Workplace Violence," page 1 of 3 (emphasis added).
[12] DHRM Policy 1.80, pages 2-3 of 3.
[13] Under the Occupational Safety and Health Act of 1970 (OSHA), an employer must establish "place[s] of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. 654(a)(1).
[14] *See* Patrolman's Benevolent Association of the City of New York, Inc. v. the City of New York, 310 F.3d 43 (2nd Cir. 2002). A police officer's transfer to a position where the officer no longer worked in his area of expertise (domestic violence) coupled with his fear for personal safety because the level of mistrust among the other officers in the precinct entitled jury to conclude, "if it so chose, that the transfer had a sufficiently material negative impact on the terms and conditions of [the officer's] employment with the NYPD to constitute an adverse employment action." 310 F.3d. at 51-52. *See also* Herrnreiter v. Chi. Hous. Auth., 315 F.3d 742 (7th Cir. 2002), describing a "materially adverse employment action" or "tangible employment action" as including the circumstance where "the employee is not moved to a different job or the skill requirements of his present job altered, but the conditions in which he works are changed in a way that subjects him to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in his workplace environment . . . ." 315 F.3d at 744 (emphasis added). *See also* EDR Ruling # 2002-232.
[15] *Id.*

retaliation for challenging the continued misapplication of that policy for a further exploration of what could be interrelated facts and issues.

The May 27, 2004 Grievance

The May 27th grievance asserts that the grievant was improperly counseled by a Major at a meeting in the presence of others for the alleged use of obscene language. The grievant complains that the counseling was retaliation for his March 15th grievance regarding the cancer rumor.

As stated above, for any grievance to qualify for hearing, including one based on retaliation, there must be evidence raising a sufficient question that the grievant suffered an adverse employment action. In addition, the General Assembly has limited other issues (e.g., misapplication of policy, arbitrary and capricious performance evaluation) that may be qualified for a hearing to those that involve "adverse employment actions."[16] The threshold question then becomes whether or not the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment act constituting a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[17]

For the May 27th grievance to qualify for hearing, the action taken against the grievant must result in an adverse effect *on the terms, conditions, or benefits* of his employment.[18] A counseling, even one in the presence of others, by itself, would not appear to rise to the level of an adverse employment action where the employee presents no evidence that the counseling detrimentally affected the terms and conditions of his employment.[19] In this case, the grievant has not presented any such evidence. Accordingly, this grievance is not qualified for hearing.[20]

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[16] Va. Code § 2.2-3004(A).

[17] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

[18] Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

[19] *See* Rennard v. Woodworker's Supply, Inc., 101 Fed. Appx. 296, 2004 U.S. App. LEXIS 11366 (10th Cir. 2004). *See also* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371 (4th Cir. 2004)(The court held that although the plaintiff's performance rating was lower than the previous yearly evaluation, there was no adverse employment action as the plaintiff failed to show that the evaluation was used as a basis to detrimentally alter the terms or conditions of his employment, the evaluation was generally positive, and he received both a pay-raise and a bonus for the year.). Brown v. Brody, 199 F.3d 446 (D.C. Cir 1999), "[A] thick body of precedent . . . refutes the notion that formal criticism or poor performance evaluations are necessarily adverse actions." Brown, 199 F.3d at 458 citing to Mattern v. Eastman Kodak Co., 104 F.3d 702, 708, 710 (5th Cir. 1997); Rabinovitz v. Pena, 89 F.3d 482, 486, 488-90 (7th Cir. 1996); Smart, 89 F.3d at 442-43; Kelecic v. Board of Regents, 1997 U.S. Dist. LEXIS 7991, No. 94 C 50381, 1997 WL 311540, at *9 (N.D. Ill. June 6, 1997); Lucas v. Cheney, 821 F. Supp. 374, 375-76 (D. Md. 1992); Nelson v. University of Me. Sys., 923 F. Supp. 275, 280-82 (D. Me. 1996); cf. Raley v. St. Mary's County Comm'rs, 752 F. Supp. 1272, 1278 (D. Md. 1990).

[20] This case is distinguishable from that discussed in EDR Rulings 2004-761, 2004-917, & 2004-918, in which an employee had challenged the agency's practice of dismissing valid inmate discipline and had

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

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Claudia T. Farr
Director

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William G. Anderson, Jr.
EDR Consultant, Sr.

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claimed that he was retaliated against for objecting to this agency practice. The employee in EDR Rulings 2004-761, 2004-917, & 2004-918 had initiated three grievances, each of which claimed that certain agency actions were in retaliation for his challenges to the agency's practice of negating valid inmate discipline. All three of these grievances were qualified and consolidated for a single hearing under a hostile workplace analysis. The difference between that case and the instant one is that in each of the three grievances at issue in EDR Ruling # 2004-761, 2004-917, & 2004-918, the employee had claimed that he had been a victim of a pattern of retaliation, all of which stemmed from the same protected activity-- his complaints about the agency's negation of valid inmate discipline. In this case, however, the grievant complains of retaliation but for *unrelated* activities—(i) complaining of the dismissal of inmate charges and (ii) a prior grievance challenging the cancer rumor. Thus, because there is no common thread linking the two activities at issue here, and because there is no adverse employment action associated with the May 27th grievance, the May 27th grievance is not qualified for hearing.